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10 Attorneys for Defendants  
11 Patenaude & Felix, A Professional Corporation  
12 and Raymond Alcide Patenaude

13 UNITED STATES DISTRICT COURT  
14 NORTHERN DISTRICT OF CALIFORNIA  
15 SAN JOSE DIVISION

16 PATRICIA CLAIRE BANKSTON,

17 Plaintiff,

18 vs.

19 PATENAUDE & FELIX, A  
20 PROFESSIONAL CORPORATION,  
21 a California Corporation, and  
22 RAYMOND ALCIDE  
23 PATENAUDE, individually and in  
24 his official capacity,

25 Defendants.

CASE NO.: C 07 03396 JW PVT

**DEFENDANT'S OBJECTIONS  
TO DECLARATION OF FRED  
SCHWINN IN SUPPORT OF  
AWARD OF ATTORNEY'S  
FEES AND COSTS**

NO HEARING DATE NOTICED

Defendants PATENAUDE & FELIX, A.P.C. and RAYMOND ALCIDE PATENAUDE (“Defendants”) hereby object to the Declaration of Fred W. Schwinn in Support of Award of Attorney’s Fees and Costs.

### **OBJECTIONS**

Defendants object to the Schwinn Declaration on the grounds that:

1. Plaintiff has failed to file a regularly noticed motion;
2. Plaintiff failed to accept Defendants’ Rule 68 Offer of Judgment; and
3. The attorney’s fees requested by counsel for Plaintiff are unreasonable and excessive.

### **STATEMENT OF FACTS**

On or about June 28, 2007, Plaintiff filed suit against Defendants alleging violations of the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. § 1692, *et seq.* On December 19, 2007, Defendants served an Offer of Judgment on Plaintiff, pursuant to Rule 68 of the Federal Rules of Civil Procedure. The Offer read in pertinent part as follows:

Judgment shall be entered against Patenaude & Felix, A.P.C. and Raymond A. Patenaude in the total amount of One Thousand One Dollars (\$1,001.00) for statutory damages, plus Zero Dollars (\$0.00) in actual damages, plus attorneys fees and taxable costs in the amount of Two-Thousand Five Hundred Dollars (\$2,500.00).

Declaration of Tomio B. Narita In Support of Defendants’ Objections (“Narita Declaration”), at ¶ 2. Plaintiff did not accept Defendants’ Rule 68 Offer. *See id.*

Subsequently, the Court granted summary judgment in favor of Plaintiff and awarded her damages in the amount of \$250.00. *See Order Granting Summary Judgment*, Doc. 28 (June 13, 2008). Plaintiff’s counsel, Fred Schwinn, then filed his declaration requesting attorney’s fees, as well as the supporting declarations of two other consumer attorneys. Plaintiff, however, did not file a motion for

1 attorney's fees or a supporting memorandum. Nor did Plaintiff meet and confer  
2 with Defendants prior to filing these declarations. *See* Narita Declaration at ¶ 3.

### 4 ARGUMENT

#### 5 **A. PLAINTIFF MUST FILE A MOTION FOR AN AWARD OF** 6 **ATTORNEY'S FEES**

7 This Court's local rules 54-1(a) and 54-6(a) provide that a motion for an  
8 award of attorney's fees must be filed with fourteen days after  
9 entry of Judgment in the action. *See* L.R. 54-6(a). The Rules further provide that  
10 the parties must meet and confer for the purpose of resolving all disputed issues  
11 relating to attorney's fees before making a motion for award of attorney's fees.  
12 *See* L.R. 54-6(b)(1).

13 Judgment was entered in this action on June 13, 2008. Plaintiff filed her  
14 attorney's fees declarations on June 27, 2008, but did not file a noticed motion and  
15 supporting memorandum, as required by the Local Rules. Nor did Plaintiff meet  
16 and confer with Defendants prior to filing her declarations. For these reasons,  
17 Plaintiff's request for attorney's fees should be denied.

#### 18 **B. PLAINTIFF FAILED TO ACCEPT A REASONABLE RULE 68** 19 **OFFER OF JUDGMENT**

20 The consumer in an FDCPA suit should be denied attorney's fees for the  
21 work done after the offer of judgment where the offer was sufficient to settle the  
22 case. *See* Fed. R. Civ. P. 68; *Lee v. Thomas & Thomas*, 109 F.3d 302 (6th Cir.  
23 1997). Here, Defendants served Plaintiff with a Rule 68 Offer of Judgment on  
24 December 19, 2007. Defendants offered to have judgment entered against them in  
25 the amount of \$1,001.00 in statutory damages, plus \$2,500.00 for attorney's fees  
26 and costs. At that time, the case was in its infancy and the settlement offer was  
27 reasonable, given the amount of costs and attorney's fees incurred to date.  
28 Plaintiff did not accept this Offer.

1 Although Plaintiff later prevailed on her summary judgment motion, the  
2 Court awarded only \$250.00 in statutory damages, less than one-fourth the amount  
3 of statutory damages previously offered by Defendants. Defendants' Rule 68  
4 Offer was eminently reasonable, especially given the fact that the attorney's fees  
5 requested by Plaintiff are unreasonable, as discussed below. Thus, Plaintiff's  
6 request for attorney's fees after the Offer of Judgment was served should be  
7 denied.

8 **C. THE ATTORNEY'S FEES REQUESTED ARE**  
9 **UNREASONABLE AND EXCESSIVE**

10 Plaintiff's counsel, Fred Schwinn, requests an hourly rate of \$300.00 per  
11 hour. This is excessive. Defendants submit that an hourly rate of \$225.00 to  
12 \$250.00 is reasonable and in line with other cases in this jurisdiction, such as *Abad*  
13 *v. Williams, Cohen & Gray*, 2007 WL 1839914 (N.D. Cal. June 26, 2007), where  
14 the court awarded \$250.00 per hour to FDCPA counsel with much more  
15 experience than Mr. Schwinn.

16 Additionally, the hours claimed by Mr. Schwinn are unreasonable. For  
17 example, Mr. Schwinn seeks to recover \$30.00 each for numerous entries for  
18 "Receive and Review," to review e-mails and documents that would undoubtedly  
19 take 15 seconds or less to "review." Further, the preparation of some documents  
20 including Discovery (on 10/12/2007) billing 3.0 hours for a total of \$900.00 seems  
21 excessive since much of the discovery is standard and requires little work.  
22 Therefore, these amounts should be reduced as well. *See, e.g., Kinh Tong v.*  
23 *Capital Management Servs. Group, Inc.*, 2008 WL 171035 (N.D. Cal. Jan. 18,  
24 2008) (reducing hours claimed by Mr. Schwinn from 65.5 to 18 based on "court's  
25 judgment of what hours would have been necessary to expend to resolve the case  
26 if counsel had reasonably focused on that agenda").  
27  
28

**CONCLUSION**

Because Plaintiff has failed to comply with the Court's Local Rules by filing a properly noticed motion, her request for attorney's fees should be denied. Alternatively, Plaintiff's request for attorney's fees incurred after the date the Offer of Judgment was served should be denied, and the hourly rate and hours claimed are unreasonable and should be reduced.

Respectfully submitted,

DATED: July 15, 2008

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